Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition for Declaratory Ruling and Rulemaking With Respect to Defining, Predicting and Measuring "Grade B Intensity" For Purposes of the Satellite Home Viewer Act	)	RM No. 9345

REPLY OF ECHOSTAR COMMUNICATIONS CORPORATION

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SUMMARY

EchoStar Communications Corporation ("EchoStar") hereby files its Reply in support of its petition for an urgently needed rulemaking to develop a model for predicting, and rules for measuring, "Grade B intensity" for purposes of the Satellite Home Viewer Act ("SHVA").[1] Several broadcast interests have filed oppositions to EchoStar's Petition,[2] in an effort to keep this agency from ruling on issues within its unique area of expertise that are, for that reason, entrusted to it by Congress. The broadcasters would prefer that these issues be decided by a body that lacks this expertise – the federal court in Miami, Florida – on the basis of the broadcasters' inaccurate presentations to that court of what the Commission has ruled on these matters. In the course of this exercise, the broadcasters find themselves in the uncomfortable position of having to rebut their own arguments and to change their position dramatically depending on the forum that hears them and the results they desire.

To the court in Florida, the broadcasters essentially asserted that it should enforce the SHVA by adopting their proposed model for predicting "Grade B intensity," and should do

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1 17 U.S.C. § 119(d)(10).

2 Comments of the Network Affiliated Stations Alliance (filed Sept. 25, 1998) ("NASA Comments"); A.H. Belo Corporation's Opposition to Petition for Declaratory Ruling and/or Rulemaking of EchoStar Communications Corporation (filed Sept. 25, 1998) ("Belo Opposition"); Comments of Cosmos Broadcasting, Inc. and Cox Broadcasting, Inc. Concerning the Filing of the EchoStar Petition (filed Sept. 25, 1998) ("Joint Broadcasters' Comments"); Comments of the National Association of Broadcasters on Petition for Rulemaking Filed by EchoStar Communications Corporation (filed Sept. 25, 1998) ("NAB Comments"). There has also been strong support for EchoStar's Petition. *See* Satellite Broadcasting & Communications Association's Comments on the Petition for Declaratory Ruling and/or Rulemaking of EchoStar Communications Corporation (filed Sept. 25, 1998) ("SBCA Comments"); Comments of PrimeTime 24 in Support of Petition for Declaratory Ruling and Rulemaking of EchoStar Communications Corporation (filed Sept. 25, 1998) ("PrimeTime 24 Comments").

so because this predictive model has been approved by the expert agency – this Commission.[3] Before this agency, they now change their position by arguing that the Commission should *not* develop a predictive model appropriate for SHVA purposes, because the term Grade B intensity used by Congress means actual measurements and does not allow for development and use of a predictive model.[4] To explain away their having proposed their own preferred version of a predictive model to the Miami court, they state, as if this made any difference, that their proposal to the court was intended merely as a "tool" or "presumption."[5] Incredibly, they add that they

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[3] *See* Plaintiff's Response to Defendant's "Motion for Clarification" of This Court's May 13 Order and Request for Hearing in *CBS Inc. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-NESBITT at 4 (S.D. Fla., filed June 2, 1998) ("Plaintiff's Longley-Rice maps were created in the manner specified by the FCC, and the Court should direct PrimeTime 24 *to follow the FCC method.*"); *Id.* at 6 ("Replacement of *the FCC approach* with [defendants'] eccentric 97% / 97% approach would result in a major underprediction of stations' actual coverage areas."). Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction in *CBS Inc. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-NESBITT, Declaration of Jules Cohen at 4 (S.D. Fla., filed Mar. 11, 1997) ("Broadcasters' Injunction Memorandum") ("The traditional method of predicting a station's signal intensity is to use maps showing contours representing the outer boundaries of grades of service. The prediction method, *as specified by the FCC*, places particular emphasis on the terrain between two and ten miles from the transmitter, and assumes the national average terrain roughness beyond that distance."); Plaintiff's Emergency Motion for Immediate Ruling on Their Motion for Preliminary Injunction in *CBS Inc. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-NESBITT at 10 (S.D. Fla., filed Feb. 27, 1998) ("Broadcasters' Emergency Motion") ("Magistrate Johnson concluded that, if not enjoined, defendant is likely to inflict still further irreparable injury in plaintiffs by signing up hundreds of thousands of *new* illegal subscribers during the pendency of the case . . . . *As the updated maps illustrate, the overwhelming majority of these new subscribers – like the subscribers shown in the maps submitted at the hearing by Magistrate Judge Johnson –* ***are unlawful***.").

[4] *E.g.*, NASA Comments at 18 ("[T]he Commission cannot defy the expressed intent of Congress and engraft the predicted contour standard proposed by EchoStar onto the Act.").

[5] NASA Comments at 12 ("The Miami court, in the exercise of its equitable powers, utilized conventional Longley-Rice signal propagation maps to establish "presumptions" about where a Grade B signal may or may not be received.").

had proposed this model to the court to *help* the satellite carriers, and (presumably) that this philanthropic gesture does not reflect their view of what the statute allows.[6]

The broadcasters should not be allowed to succeed at this shell game. EchoStar in fact agrees that the court employed the broadcaster-proposed predictive model as a presumption. What the broadcasters disregard is this agency's ample authority to define a term such as "Grade B intensity" by establishing just such presumptions. Under recent Supreme Court precedent, the congressional reference "defined by the Federal Communications Commission" means that the Commission has the authority to define, and re-define, "Grade B intensity." In turn, the Commission may choose to do so with the aid of a presumption such as a predictive model. The Commission, as well as Congress, chooses to define terms by use of presumptions all the time. The agency's authority to create presumptions based on connections between proven and inferred facts is better-entrenched than that of a court, which, as twenty-three members of Congress recently observed, cannot be expected to "establish telecommunications policy."[8] The

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[6] *E.g.*, NAB Comments at 17 ("In the Miami case, the Court *bent over backwards* to allow PrimeTime 24 to serve subscribers that it had not tested and as to which it had therefore not met its burden of proof. Specifically, in fashioning a preliminary injunction, the Court permitted PrimeTime 24 to deliver network programming to any household predicted by Longley-Rice (run in the standard manner) *not* to receive a signal of Grade B intensity, provided that the household meets the other applicable legal requirements.").

[7] *Chemical Manufacturers Association v. Department of Transportation*, 105 F.3d 705 (D.C. Cir. 1997); *see also United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985); *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355, 1385; *see also Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 921 (D.C. Cir. 1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983); *Sierra Club v. Costle*, 657 F.2d 298, 332-33 (D.C. Cir. 1981).

[8] Letter from the Honorable Rick Boucher *et al.* to Chairman William Kennard (Aug. 7, 1998).

broadcasters argue that the court may adopt presumptions of their own liking, while the Commission, despite its explicit authority to define Grade B intensity and its power to define a term by use of predictive presumptions, may not. And, even less defensibly, argue that the court may adopt a predictive model based on what the broadcasters say the Commission has ruled, but the Commission may not conduct a rulemaking when actually asked to rule on an appropriate predictive model.

Continuing their effort to handcuff the Commission, the broadcasters assert that the Commission should stay its hand because the SHVA reflects a preference of Congress for cable systems over satellite carriers, and thus grants monopoly rights to cable operators.[9] As the Commission well knows, however, Congress has never legislated such a preference. Instead, Congress has consistently intended to *combat* the monopoly power of cable systems and promote "effective competition" to cable operators from satellite carriers and other distributors.[10] Congress has made this intent crystal-clear in a series of enactments, and has placed the Commission in charge of the colossal efforts needed in that regard.[11]

The broadcasters are now suggesting that Congress was undoing its work in those statutes when it renewed in 1994 a copyright law that, in the broadcasters' view, gives cable systems a monopolistic concession. The SHVA does nothing of the kind. While the satellite

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[9] NAB Comments at 13, 14 (claiming that Congress "expressly designated cable as the preferred delivery system for network stations" and that the SHVA "generally *prohibits* satellite companies from competing with cable") (emphasis in original).

[10] *See* 47 U.S.C. § 622 (exempting cable operators subject to effective competition from rate regulation).

[11] *See, e.g.*, Cable Act of 1992, P.L. 98-549 § 2(a)(2) (finding that cable exercises "undue market power . . . as compared to that of consumers and video programmers").

compulsory license is narrower than the cable compulsory license, this difference in scope must be interpreted so as to avoid the grant of a statutory monopoly.[12] As the broadcasters know, it was they, and not the cable television interests, that lobbied Congress for the unserved household restriction, including the 90-day rule. It would be very strange if Congress had decided to bestow a monopoly right that was not even solicited by the right's beneficiary, particularly when that beneficiary already holds a monopoly in the marketplace that Congress is striving to eliminate, with the help of this Commission.

The inconsistencies in the broadcasters' positions become almost schizophrenic when they start explaining the reason for the purported congressional discrimination in favor of cable systems and against satellite carriers. The reason, they say, is that cable systems provide local signals and satellite carriers do not. Coming from the broadcasters, this argument is astounding. EchoStar can provide local signals to at least 20 metropolitan centers throughout the country. In fact, EchoStar does provide such service today to about 13 cities, except that it is limited mainly because of the broadcasters' effort to thwart EchoStar's plan at every turn.

EchoStar has requested, and the Copyright Office has initiated, a proceeding to confirm the extent of the compulsory license with respect to local-into-local retransmission.[13] It

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[12] *Piedmont Power & Light Co. v. Town of Graham*, 253 U.S. 193, 194 (1920); *see also City of Mitchell v. Dakota Central Telephone Co.*, 246 U.S. 396, 410 (1918); *Blair v. City of Chicago*, 201 U.S. 400, 463, 473 (1906); *Knoxville Water company v. Mayor and Alderman of the City of Knoxville*, 200 U.S. 22, 33-34 (1906); *City of Groton v. Yankee Services Company*, 620 A.2d 771, 775 (Conn. 1993).

[13] *See Satellite Carrier Compulsory License: Definition of Unserved Household*, Notice of Inquiry, 63 Fed. Reg. 3685 (Lib. of Cong. Copyright Office, Jan. 26, 1998).

has also advocated the passage of legislation to confirm and expand local retransmission rights of satellite carriers.[14]

The broadcasters, however, have devoted their vast resources to an effort to frustrate these initiatives. They say that they would support local-into-local retransmission subject to "appropriate" conditions.[15] In reality, these "appropriate" conditions are a poison pill that would inter local-into-local retransmission in the name of allowing it. The broadcasters take the position that satellite carriers may not provide *any* local station signals in a market unless they provide *all* such signals in that market.[16] That would be technically infeasible as well as constitutionally indefensible, as satellite carriers lack both the market power and bottleneck characteristics that made must-carry appropriate for cable operators. The broadcasters should not now be allowed to invoke the satellite carriers' "failure" to provide local signals as a basis for contracting the satellite carriers' ability to provide distant signals to households that cannot receive a local signal.

To dissuade the Commission from commencing the requested a rulemaking, the broadcasters devote many of their pages to extolling the virtues of the network-affiliate

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[14] *See In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Lib. of Cong. Docket No. 96-3, CARP-SRA at 11 (Aug. 28, 1997).

[15] *See, e.g.*, Belo Opposition at 11 (supporting "local-into local distribution with appropriate must-carry and retransmission consent rights for local stations").

[16] According to the latest formulation of the broadcasters' position, which was billed by the broadcasters as a major concession compared to prior even more recalcitrant versions, the NAB "shall consider [subject to other conditions] a delayed implementation of full must-carry until a specific date in the future, with an interim must-carry less than the carriage of all local stations in the market." NAB Board Principles on SHVA Legislation (Sept. 29, 1998).

relationship.[17] EchoStar respects the network-affiliate relationship, and has consistently recognized that it is one of the purposes behind the SHVA (although not the only one, as the broadcasters appear to suggest). At the same time, the rulemaking requested by EchoStar does not endanger the network-affiliate system. The purpose of this rulemaking is to ensure that people *without* access to local network service are eligible to receive distant network service by satellite. Such satellite service to households that are not really served by a local network affiliate does nothing to threaten the network-affiliate system and does much to accomplish the fundamental policy objectives that the Commission shares with the drafters of the SHVA: ensuring network service for as many Americans as possible.[18]

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[17] *See* NAB Comments between pages 7 and 13; Joint Broadcasters' Comments between pages 11 and 19; NASA Comments between pages 31 and 34.

[18] *Satellite Home Viewers Act of* 1988, H. Rep. No. 100-887 Part 2 at 15 (1988) ("In the instant case, however, the Committee perceived a need to address an existing problem that may serve to deny millions of American households access to satellite delivered broadcast television signals.") *See also* 134 Cong. Rec. 28584 (1988) (remarks of Rep. Rinaldo) ("The basic purpose of the Satellite Home Viewer Copyright Act is to extend the reach of broadcast TV stations and programs to citizens who cannot receive them any other way."); 104 Cong. Rec. H8419 (daily ed. Aug. 16, 1994) (remarks of Rep. Hughes) ("[Extension of the SHVA] ensures that millions of Americans who cannot receive over-the-air television signals or cable will have access to network signals.").

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[1] 17 U.S.C. § 119(d)(10).

[2] Comments of the Network Affiliated Stations Alliance (filed Sept. 25, 1998) ("NASA Comments"); A.H. Belo Corporation's Opposition to Petition for Declaratory Ruling and/or Rulemaking of EchoStar Communications Corporation (filed Sept. 25, 1998) ("Belo Opposition"); Comments of Cosmos Broadcasting, Inc. and Cox Broadcasting, Inc. Concerning the Filing of the EchoStar Petition (filed Sept. 25, 1998) ("Joint Broadcasters' Comments"); Comments of the National Association of Broadcasters on Petition for Rulemaking Filed by EchoStar Communications Corporation (filed Sept. 25, 1998) ("NAB Comments"). There has also been strong support for EchoStar's Petition. *See* Satellite Broadcasting & Communications Association's Comments on the Petition for Declaratory Ruling and/or Rulemaking of EchoStar Communications Corporation (filed Sept. 25, 1998) ("SBCA Comments"); Comments of PrimeTime 24 in Support of Petition for Declaratory Ruling and Rulemaking of EchoStar Communications Corporation (filed Sept. 25, 1998) ("PrimeTime 24 Comments").

decided by a body that lacks this expertise – the federal court in Miami, Florida – on the basis of the broadcasters' inaccurate presentations to that court of what the Commission has ruled on these matters. In the course of this exercise, the broadcasters find themselves in the uncomfortable position of having to rebut their own arguments and to change their position dramatically depending on the forum that hears them and the results they desire.

I. THE COMMISSION HAS AMPLE AUTHORITY TO DEFINE "GRADE B INTENSITY" FOR SHVA PURPOSES BY CREATING A PREDICTIVE MODEL AND TO PROMULGATE AN APPROPRIATE METHODOLOGY FOR MEASURING GRADE B INTENSITY

The broadcasters suggest that the Commission has no authority to define "Grade B signal intensity" and that it may not develop a presumption to predict Grade B intensity because such actions would "countermand the judgment of a federal district court about how to exercise its discretion in enforcing the Copyright Act."[3] At the outset, EchoStar agrees with the twenty-three Members of Congress who believe that "the Commission should not expect the Florida District Court to establish national telecommunications policy."[4] But, more specifically, to suggest that the Commission has no authority in this area is to ignore the SHVA, well-settled precedent, and, indeed, the broadcasters' own litigation strategy.

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[3] NAB Comments at 2.

[4] Letter from the Honorable Rick Boucher *et al.* to Chairman William Kennard (Aug. 7, 1998).

A. The SHVA Delegated to the Commission the Authority to Define – And To Change the Definition of – the Term "Grade B Intensity"

EchoStar has demonstrated that the Commission has the authority to define – and to change the definition of – the term "Grade B intensity." As before, the broadcasters argue that the definition of Grade B intensity was frozen in place by Congress in 1988. Yet, as EchoStar has noted, the legislative history of the SHVA conclusively proves that Congress intended to track the Commission's definition of Grade B intensity as it changes from time to time. Indeed, the legislative history of a similar provision involving "Grade B contour" (as opposed to intensity) demonstrates the correctness of EchoStar's view. As part of the 1984 Cable Act, Congress defined "Grade B contour" as "the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission."[5] The House Report noted that "*the current formula* for computing the grade B contour is found at 47 CFR 73-684."[6] By referring to "the current formula," Congress was explaining that the statutory words "promulgated by" the Commission (just like "defined by" the Commission here) allow for the possibility that the Commission may redefine the term in question. The legislative history of the 1984 Cable Act gives even more unequivocal meaning to the parallel explication of "as defined by the FCC" in the legislative history of SHVA: "as defined by the FCC, ***currently in*** 47 C.F.R. section 73.783(a)."[7] In the 1984 Cable Act, as in the SHVA, Congress intended to delegate

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[5] This provision is currently codified at 47 U.S.C. § 522(11).

[6] H. Rep. No. 98-134, at 45 (1988) (emphasis added); *reprinted in* 1984 U.S.C.A.N. 4655, 4682.

[7] H. Rep. No. 100-887 Part 1, at 26 (1988) (emphasis added); *see also* H. Rep. No. 100-887 Part 2, at 24 (1988).

authority to define (and redefine) Grade B issues to the agency with the relevant expertise concerning such issues – the Commission.

EchoStar has also noted that the Supreme Court recently held in *Lukhard v. Reed*: "[i]t is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place."[8] The facts of *Lukhard* are quite similar to the case at hand. There, the statute governing the Aid to Families with Dependent Children ("AFDC") program required states to consider a family's "income and resources" in determining whether that family is needy. A family's eligibility to receive benefits sometimes depended on whether a given sum of money was classified as "income" or "resources." In 1983, the Virginia Department of Social Services revised its regulations to include personal injury payments as income rather than as resources, thereby rendering certain families ineligible for the program. These families argued that "the Congress that passed the OBRA amendment must have been aware of [the Department of Health and Human Services' ("HHS")] longstanding position that 'income' excluded personal injury awards, and that its use of 'income' in the OBRA amendment therefore necessarily indicated an intent that the term be interpreted in that manner."[9] The Court rejected this argument, noting that the Virginia agency was free to change its classification of income regardless of HHS's prior classifications. Thus, as in the present case, where Congress delegated the authority to define a statutory term to an agency, that agency was free to adjust that definition, with corresponding consequences for the eligibility of affected individuals under the statute in question.

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8 *Lukhard v. Reed*, 481 U.S. 368, 379 (1987).

9 *Id.*

None of the broadcasters' rationales for ignoring the teaching of *Lukhard* withstands scrutiny. ***First***, they argue that "where one statute adopts that particular provision of another by a specific and descriptive reference to the statute or provisions adopted . . . such adoption takes that statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent."[10] The present case – like *Lukhard* but unlike the cases cited by the broadcasters[11] – does not concern one statute adopting provisions *of another statute*, but concerns a statute adopting provisions of *administrative regulation*. The two situations are entirely different. In the former case, a legislature seeks to "borrow" successful legislation from another jurisdiction or area, while in the latter a legislature seeks to delegate a technical or otherwise difficult subject to the expert agency best equipped to deal with it.[12]

Parenthetically, even had the definition of "income" in *Lukhard* been borrowed from a statute rather than delegated to an agency, it is not clear that the broadcasters "specific and descriptive reference" claim can bear the weight given to it. In *Lukhard*, the broadcasters

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[10] NAB Comments at 28, *quoting Hassett v. Welch*, 303 U.S. 303, 314 (1938). EchoStar notes the existence of a competing canon, that "when a statute is adopted from another jurisdiction it is presumed that interpretations of that statute by courts of that jurisdiction are also adopted with it." *Zerbe v. State*, 583 P.2d 845 (Ala. 1979).

[11] *See Southwestern Bell Corporation v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995) (interpreting Communications Act in parallel with Interstate Commerce Act); *Curtis Ambulance of Florida v. Board of County Commissioners*, 811 F.2d 1371 (10th Cir. 1987) (refusing to "update" local government resolution to reflect changes in state law); *Hassett v. Welch*, 303 U.S. 303, 314 (1938) (refusing to "update" one provision of estate tax law to reflect changes in another provision of estate tax law).

[12] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation* 842 (2d ed. 1995).

claim, the definition of "income" was so vague as to practically invite an agency to redefine it over time, while in the SHVA, the argument goes, the reference to "Grade B intensity" was "specific and descriptive" and therefore cannot be changed.[13] EchoStar, however, cannot discern any "specificity" in the use of the term "Grade B intensity," a term as esoteric and dependent on an agency's technical expertise as can be imagined. The term "Grade B intensity" was deliberately left vague. Had Congress wanted to be "specific," it could have copied verbatim the Commission's then-current signal measurements in dBu. By choosing not to do so, and by referring to the term "as defined by the FCC, ***currently in*** 47 C.F.R. section 73.783(a),"[14] Congress signaled that the term "Grade B intensity" was a "vague" one – to be made "specific" only by the Commission.

Second, the broadcasters claim that, "in *Helvering* and *Lukhard*, the issue was whether an agency could redefine terms contained in a statute *administered by that agency*."[15] Because the SHVA is a copyright law, the argument goes, the Commission has no authority to interpret it. It is true that the SHVA is in large part a copyright law, administered by the Library of Congress' Copyright Office. However, Congress referred the critical definition of "Grade B intensity" *not* to the Copyright Office, but to the Commission. Congress thus made the determination that the definition of Grade B intensity would be left to the agency best equipped

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[13] NAB Comments at 28 n.18. NASA makes essentially the same argument when it claims that "the terms at issue in *Luckhard* and *Helvering* were ambiguous terms purposely left *undefined* by Congress." NASA Comments at 25.

[14] H. Rep. No. 100-887 Part 1, at 26 (1988) (emphasis added); *see also* H. Rep. No. 100-887 Part 2, at 24 (1988).

[15] NASA Coments at 25.

to administer it. When the broadcasters state that "an administrative agency has familiarity and expertise concerning the statutes it is entrusted to administer and may interpret those statutes," they could make no more cogent argument for the *Commission's* authority to define "Grade B intensity," which is, after all, a broadcast propagation standard. Indeed, the Copyright Office itself has acknowledged as much when it stated that it "lacks expertise in communications law."[16]

B. The Commission Also Has Authority to Create Appropriate Predictive Models and Presumptions Related to "Grade B Intensity"

Part and parcel of the Commission's jurisdiction to define a quantitative term such as "Grade B intensity" is the power to develop a presumption for when that quantity is expected to be found – in other words, a model to predict the incidence of Grade B intensity. Terms are defined by recourse to presumptions all the time. If the Commission, as well as Congress, were not able to use presumptions to define a term, legislative and regulatory rulemaking activity would be paralyzed. To take an almost random example, when Congress enacted the Cable Competition Act of 1992, it defined "effective competition" as a situation where, *inter alia*, "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system."[17] Surely, Congress did not have before it specific proof that, say, 29% cable penetration entails substantially more competition than 31% penetration. But, having to draw a

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[16] Comments of the Satellite Broadcasting & Communications Association in RM 9335 at 5 n.8 (filed July 22, 1998) ("SBCA NRTC Comments") *citing* U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* at 117 (1997) ("*Copyright Office Report*").

[17] 47 U.S.C. § 622(l)(1).

definitional line somewhere, it chose to enact an *irrebuttable presumption* that less than 30% cable penetration equals effective competition. Likewise, when the Commission established its auction rules, it defined the term "control" by citing a number of situations where control is *presumed*.[18] When it first adopted these rules, the Commission discussed its authority to create presumptions:

> We continue to believe that determinations of *de facto* control for purposes of determining designated entity eligibility . . . are inherently factual and therefore will require case-by-case determination. *Nevertheless, to provide a level of certainty for designated entities and to ensure that designated entities maintain de facto control, we believe it is appropriate to articulate some guidelines for defining de facto control in this context.* . . . We emphasize, however, that these criteria are guidelines only and are not necessarily dispositive of the issue of *de facto* control in all situations.[19]

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[18] Thus: "Immediate family members will be *presumed* to own or control or have the power to control interests owned or controlled by other family members," 47 C.F.R. § 1.2110(b)(4)(iii)(B); "An applicant is *presumed* to control of have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock," 47 C.F.R. § 1.2110(b)(4)(iv)(A); "An applicant is *presumed* to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock her or she owns, controls or has the power to control is large as compared with any other outstanding block of stock," 47 C.F.R. § 1.2110(b)(4)(iv)(B); "Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity," 47 C.F.R. § 1.2110(b)(4)(vii); "Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern. . . ." 47 C.F.R. § 1.2110(b)(4)(viii); "Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern." 47 C.F.R. § 1.2110(b)(4)(ix).

[19] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd. 403, 447 (1994).

These two instances demonstrate the close relationship between the power to define a term ("effective competition" or "control") and the power to develop a presumption as to when that term is fulfilled.

Presumptions such as predictive models are not exotic concepts, but are merely "tools which the legal system employs to advance its objective of accuracy in fact-finding."[20] They are employed because "[e]veryday legal proceedings are supposed to reach definite conclusions about individual entitlements and responsibilities, notwithstanding any limits of information . . . even when vitally relevant information is either too costly or simply unavailable."[21]

Indeed, because of the regular need for development of presumptions by regulatory agencies, courts have frequently had occasion to confirm the agencies' broad authority to employ predictions or presumptions to rectify the problem of costly or unavailable information. As one court put it, "an agency may utilize a predictive model so long as it explains the assumptions and methodology it used in preparing the model."[22] And only last year, the D.C. Circuit stated: "It is well settled that an administrative agency may establish evidentiary

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20 Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 Harv. J. L. Pub. Pol. 627, 632 (1994).

21 Richard H. Gaskins, Burdens of Proof in Modern Discourse 4 (1992).

22 *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355, 1385; *see also Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 921 (D.C. Cir. 1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983); *Sierra Club v. Costle*, 657 F.2d 298, 332-33 (D.C. Cir. 1981).

presumptions . . . if there is a sound and rational connection between the proved and inferred facts."[23]

The broadcasters claim that there is no uncertainty surrounding "Grade B intensity" warranting the employment of predictive models or presumptions because the SHVA requires a "quantifiable, easily-measured standard based on actual (not predicted) reception at a specific household."[24] But the possibility of house-by-house measurements does not eliminate the "uncertainty" problem. Conducting actual signal measurements for each and every one of millions of satellite subscribers is a prohibitively expensive task. Thus, the Commission is faced with a classic "costly or unavailable information" problem for which presumptions and predictive models are the commonplace regulatory solution.

But what elevates the broadcasters' arguments from the merely "wrong" to the outrageous is the fact that they have consistently – and successfully – proposed their own predictive model throughout the *PrimeTime 24* litigation (and, indeed, acknowledge that they offered it as a *presumption* to aid the court[25]). While giving lip-service to the definition of Grade

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[23] *Chemical Manufacturers Association v. Department of Transportation*, 105 F.3d 705 (D.C. Cir. 1997); *see also United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985).

[24] NASA Comments at 17. EchoStar notes that the legislative history cited by the broadcasters for this proposition is inapposite. The broadcasters cite, in boldface, a Senate Report stating: "This objective test can be accomplished by actual measurement." S. Rep. No. 103-407 at 9 and n. 4, *cited in* NASA Comments at 17. Of course, a statement that a determination of unserved households "***can*** be accomplished by actual measurement" suggests strongly that it ***can*** also be accomplished by other means.

[25] Indeed, NASA has the audacity to insist on "actual (not predicted) reception at a specific household," NASA Comments at 17, while at the same time applauding the fact that "[T]he Miami court, in the exercise of its equitable powers, utilized conventional Longley-Rice signal propagation maps to establish 'presumptions' about where a Grade B signal may or may

(Continued ...)

B intensity as an actual measurement, the broadcasters have based their entire Miami court case on a model for predicting Grade B intensity:

- "Plaintiff's Longley-Rice maps were created in the manner specified by the FCC, and the Court should direct PrimeTime 24 *to follow the FCC method.*"[26]

- "Replacement of *the FCC approach* with [defendants'] eccentric 97% / 97% approach would result in a major underprediction of stations' actual coverage areas."[27]

- "PrimeTime 24's violations in Miami are typical of its violations around the nation. *To illustrate this point*, plaintiffs created [Longley-Rice] maps showing predicted station signal propagation. . ."[28]

- "At most, PrimeTime 24 relies on a manifestly unreliable system of self-reporting by subscribers over the telephone, *without any reference to signal propagation maps . . . or any other objective data showing which prospective subscribers are likely to be 'unserved.'*"[29]

- "The traditional method of predicting a station's signal intensity is to use maps showing contours representing the outer boundaries of grades of service. The prediction method, *as specified by the FCC*, places particular emphasis on the terrain between two and ten miles from the transmitter,

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not be received . . . [when it] could have ordered PrimeTime 24 to measure *every* household it serves. . . ." NASA Comments at 12.

[26] Plaintiff's Response to Defendant's "Motion for Clarification" of This Court's May 13 Order and Request for Hearing in *CBS Inc. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-NESBITT at 4 (S.D. Fla., filed June 2, 1998).

[27] *Id.* at 6.

[28] Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction in *CBS Inc. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-NESBITT at 10 (S.D. Fla., filed Mar. 11, 1997) ("Broadcasters' Injunction Memorandum").

[29] Broadcasters' Injunction Memorandum at 13.

and assumes the national average terrain roughness beyond that distance."[30]

- "Magistrate Johnson concluded that, if not enjoined, defendant is likely to inflict still further irreparable injury in plaintiffs by signing up hundreds of thousands of *new* illegal subscribers during the pendency of the case . . . . *As the updated maps illustrate, the overwhelming majority of these new subscribers – like the subscribers shown in the maps submitted at the hearing by Magistrate Judge Johnson* - ***are unlawful***."[31]

The broadcasters have successfully convinced the Florida court to adopt their chosen presumption. Thus, the court enjoined PrimeTime 24 from:

> [R]etransmitting CBS or Fox network programming to any customer *within an area shown on a Longley-Rice propagation map as receiving a signal of at least grade B intensity* without either (1) obtaining the written consent of a CBS or Fox primary network station and the relevant network, or (2) providing the station with a signal strength test of the subscriber's household showing that it cannot receive a signal of grade B intensity as established by the FCC.[32]

The broadcasters thus argue that the Miami court may adopt their proposed predictive model based on what they say that the FCC has ruled on "Grade B intensity," but the Commission, despite its power to define the term and to do so by use of predictive presumptions, may not conduct a rulemaking when it is actually asked to rule on the meaning of Grade B intensity for SHVA purposes. The Commission should not permit that shell game.

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30 *Id.*, Declaration of Jules Cohen at 4.

31 Plaintiff's Emergency Motion for Immediate Ruling on Their Motion for Preliminary Injunction in *CBS Inc. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-NESBITT at 10 (S.D. Fla., filed Feb. 27, 1998) ("Broadcasters' Emergency Motion").

32 *CBS Inc. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-NESBITT, Order Affirming in Part and Reversing in Part Magistrate Judge's Report and Recommendation (S.D. Fla., May 13, 1998) ("*PrimeTime 24* Preliminary Injunction").

Nor should the Commission accept the bizarre effort of the broadcasters to explain away their litigation strategy by asserting that the presumption accepted by the Miami court is one designed to *help* the satellite industry.[33] If, as the broadcasters suggest, the Longley-Rice presumption places PrimeTime 24 in a better position, one would have expected PrimeTime 24 to have suggested its use. However, contrary to the claims of NASA,[34] it was the *broadcasters* who proposed Longley-Rice to the Miami Court. They surely did so not out of charity for PrimeTime 24, but out of a desire to create the broadest possible "exclusion zones" for network retransmission. They cannot now credibly assert that their philanthropic gesture in proposing that model does not accurately reflect their reading of what the statute allows.

In sum, EchoStar believes that the Commission has authority to develop presumptions and predictive models concerning the Grade B signal, and that there is indeed "a sound and rational connection" between a 99%-99%-99% predictive model and the ability to actually receive a signal of Grade B intensity. Indeed, the contours of this agency's authority to develop presumptions illustrate well why the variant of the Longley-Rice model proposed by the broadcasters in the Miami court is inappropriate: there is no "sound and rational connection" between the attenuated 50%-50%-50% probabilities used in that model and the ability to receive

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[33] *E.g.*, NAB Comments at 17 ("The Miami Court's decision to allow PrimeTime 24 to serve households it has not tested represents a generous concession, not an unfair imposition"). *Id.* ("In the Miami case, the Court *bent over backwards* to allow PrimeTime 24 to serve subscribers that it had not tested and as to which it had therefore not met its burden of proof. Specifically, in fashioning a preliminary injunction, the Court permitted PrimeTime 24 to deliver network programming to any household predicted by Longley-Rice (run in the standard manner) *not* to receive a signal of Grade B intensity, provided that the household meets the other applicable legal requirements.").

[34] NASA Comments at 22.

an adequate signal. In any case, while the broadcasters are free to disagree with EchoStar's assessments, they cannot claim that the Commission is without authority to initiate a rulemaking to *develop* appropriate predictive models and presumptions.

C. The Commission Has Clear Authority to Promulgate An Appropriate Methodology to Measure Grade B Signals

The authority to define "Grade B intensity" also encompasses without question the authority to promulgate measurement methodologies. Indeed, EchoStar fails to see how this can be a controversial point – the Commission has already once changed an "obsolete" measurement methodology.[35]

The broadcasters make no serious attempt to dispute that authority. Instead, while purporting to argue that EchoStar's proposals are "flatly inconsistent with the statute,"[36] they devote most of their energy attempting to show that EchoStar's proposals are *bad ideas*. Thus, measuring signal intensity in the vicinity of the antenna, the NAB believes, would be a *bad idea* because it would require familiarity with each customer's receiving equipment.[37] Measuring signal intensity at a height lower than thirty feet would, according to the NAB, be a *bad idea* because it would eliminate "administrative simplicity."[38]

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35 *See Amendment of Part 73 of the Rules Regarding Field Strength Measurements for FM and TV Broadcast Stations*, 53 F.C.C. 2d 855, 866 (1975) (adopting a "more acceptable" measurement methodology where "the [then-existing] measurement procedure . . . [was] obsolete.")

36 NAB Comments at 32

37 NAB Comments at 33.

38 NAB Comments at 34.

Of course, the broadcasters will have ample opportunity to dispute the substantive merits of EchoStar's measurement proposals as part of the rulemaking proceeding that EchoStar has requested. These attacks, however, are irrelevant to the question of whether the Commission should proceed with such a rulemaking.

The broadcasters' single attempt to assert a *legal* barrier to the development of SHVA-appropriate measurement rules is based on a sophistry. Apparently because the SHVA identifies an unserved household as one that "cannot receive *through the use of a conventional outdoor rooftop receiving antenna*; an over-the-air signal of Grade B intensity," the broadcasters believe, the signal must be measured *in the air at the rooftop.*[39] But "outdoor rooftop" in the SHVA simply describes where the *antenna* must be, not where the signal must be measured, and certainly not where the poor consumer can be expected to install his or her television set to receive an acceptable signal. The only place where the strength of a television signal is relevant to the statutory purposes is at the television itself. The statutory specification of an "outdoor rooftop" antenna does not change this.

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[39] *See* NAB Comments at 33. Nor can the broadcasters credibly assert that Congress intended inferences about where the measurement should occur to be drawn from the "ambient" nature of a dBU measurement. The broadcasters argue that a measurement at the TV set needs to be converted to an intensity measurement in the air above the rooftop, and in their view this would be difficult to do since it would require knowing the characteristics of a consumer's antenna and transmission line. *See id.* ("[I]t is simply not possible to use a household's own antenna/cable/television setup to measure the signal intensity "above the rooftop."). Again, this argument is based on the erroneous view that the statute requires a measurement in the air at the rooftop. EchoStar believes that a measurement at the TV set (which is eminently possible) does not need to be adjusted by *adding* "rooftop-to-set" losses, since the proper measurement is that of the signal as it is received by the consumer at the TV set (*i.e.*, not *plus* those losses). In such a measurement, there is no need to know the characteristics of each consumer's system. Finally, EchoStar notes that, even if the statute required measurements of the rooftop without adjustment (as the broadcasters believe), the Commission's current measurement rules do not accomplish this, as they contemplate measurement in the street. *See* 47 C.F.R. § 73.686.

Indeed, the very attacks of the broadcasters on the merits of EchoStar's measurement proposals demonstrate graphically the pro-consumer nature of these proposals. They cite what they regard as the "impossibility" of using "a homeowner's own (*uncalibrated*) equipment to measure signal intensity in the air above the rooftop."[40] Of course, the very fact that most homeowner's equipment is "uncalibrated" is one of the most important reasons why the current measurement methodology is grossly inappropriate. "Grade B intensity" cannot realistically be measured based on a utopian assumption that each consumer possesses perfect, and perfectly calibrated, equipment. The Commission should not entertain such an assumption in the name of the "administrative simplicity" invoked by the broadcasters. Rather, the Commission should promulgate measurement rules that reflect the real-life imperfections of consumer reception. Nor do the broadcasters *deny* that broadcast signals suffer serious attenuation from rooftop-to-television. The attenuation because of "uncalibrated" equipment, multiple televisions, and interior wiring is why the Commission should measure signal strength at the television, or, at the very least, account for these attenuation factors if it chooses to measure signal strength at the rooftop.

II. THE COPYRIGHT NATURE OF THE SHVA DOES NOT LESSEN THE COMMISSION'S NARROW BUT SPECIFIC AUTHORITY

A. The Broadcasters' Attempt to Use the Copyright Act as a Shield Against Commission Action is Unavailing

The broadcasters argue that the Commission has *no* authority in the SHVA context, because the SHVA is fundamentally a copyright statute. They state: "[a]s the

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[40] NAB Comments at 33.